IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 830.

THE SEMINOLE NATION, *Petitioner*,

v.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

REPLY BRIEF OF PETITIONER.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondent concedes (Res. Supple. Memo. p. 21), that the judgment of the Court of Claims "cannot be supported on either of the grounds stated in the opinion of the Court of Claims," and suggests that the judgment be reversed, and the cause remanded to the Court of Claims for a determination of several of the issues of law and fact.

The respondent also concedes that the lands of petitioner were erroneously excluded from the domain granted to them

by treaty of March 21, 1866, by an erroneous survey of the west line of this domain made by Nathaniel Robbins in 1871; and that the strip of lands west of the Robbins line herein involved were patented to Pottawatomie Indians and homesteaders (Supple. Memo. pp. 6, 17). With this concession of the facts the basic questions of law in the case may be raised, and we suggest to the Court that while the case is before it, time and expense would be saved were the Court to determine finally these basic questions of law, and then remand the case to the lower court for such further proceedings as it might require.

The respondent agrees with us that there are several basic questions in the case, and discusses them (Res. Supple. Memo., pp. 17-19). These questions are set forth as follows:

1. Whether the Seminole Nation acquired fee simple title to the 200,000 acres of lands granted to it by the treaty of March 21, 1866.

2. Did Robbins, in running the west boundary, exclude part of the Seminole lands from their treaty domain?

3. Whether the Seminole Nation acquiesced in the erroneous Robbins line.

4. When did the Respondent take the Seminole lands excluded by the erroneous Robbins survey?

We discuss these questions briefly below.

The Seminole Nation Acquired Fee Simple Title to the 200,000 Acres of Lands Granted to it by Treaty of March 21, 1866.

Petitioner contends that the Seminole Nation received fee simple title by the *grant in praesenti* in the treaty of March 21, 1866, and that the Seminole title was founded upon this treaty. This treaty stated in part that: "The United States, having obtained by grant of the Creek Nation the westerly half of their lands, hereby grant to the Seminole Nation" the lands described therein. The words,

"hereby grant" denote a *grant in praesenti*. *United States* v. *Brooks*, 10 How. 442; *Leavenworth, etc., Railroad Co.* v. *United States*, 92 U. S. 733, 741; *Wright* v. *Roseberry*, 121 U. S. 488, 496. The treaty was not an agreement to grant, but embodied the grant.

The fee simple title attached to all of the 200,000-acres as described in the treaty, and remained in the Seminole Nation until there was a voluntary cession by the Seminole Nation or an appropriation of said lands by the United States.

In the case of *New York Indians* v. *United States*, 170 U. S. 1, the facts are similar to those surrounding the Seminole Treaty of March 21, 1866. In that case the New York Indians by treaty ceded to the United States certain lands in Wisconsin and purchased from the United States certain other lands in what is now the State of Kansas. In that case, this Court construed the words in the treaty "in consideration of the above cession or relinquishment, * * * the United States agree to set apart" to be a *grant in praesenti*, passing the title as of the time of the making of the treaty. In the New York Indian case also the Court held that the extent of title which the Indians received, would depend upon the intention of the United States at the time the Treaty was executed, and the Court reasoned that had the United States not intended to convey to the New York Indians an immediate title *in praesenti* in all probability it would never have secured the cession of lands in Wisconsin from the New York Indians.

By the Seminole Treaty the Seminole Nation ceded to the United States over two million acres of land, and by this same treaty purchased from the United States the 200,000-acre tract now in question. We submit that this situation is analogous to the facts surrounding the making of the treaty construed in the New York Indian case, and clearly shows that the parties intended that the title pass immediately to the Seminole Nation upon the execution of the treaty of March 21, 1866; and, as the purchase price of fifty cents an

acre, by the terms of the treaty, was deducted from the moneys due the Seminoles thereunder, the transaction was fully consummated.

Respondent suggests (Supple. Mem. Page 18) that possibly the case of *Stoneroad* v. *Stoneroad*, 158 U. S. 240, might have some bearing on this question and that the title of the Seminole Nation to the 200,000 acres might possibly depend on the survey. The case of *Stoneroad* v. *Stoneroad* surely can have no application to this case, for that case dealt with title to lands in the Mexican Territory and therein this Court held that by the necessary implication, the confirmatory act of 1860 contemplated that before any patents should issue from the United States on lands previously granted to individuals by the Mexican Government, the lands should first be surveyed. In the instant case, the title granted by the Seminole treaty did not depend upon a survey to become operative, and the making of the survey was merely an incidental obligation assumed by the respondent. Three boundaries in the description of the 200,000-acre grant were fixed by the treaty; the Creek dividing line on the east, the North Fork of the Canadian River on the north, and the Canadian River on the south, and between these three boundaries and extending so far west as to include 200,000 acres, was the Seminole domain, granted by this treaty. In other words, three of the boundaries were fixed boundaries.

Furthermore, the respondent did not consider the title of the Seminoles to be held in suspension or to depend upon a survey, and even respondent at the time, considered that title had passed upon the making of the treaty, because in the fall of 1866 it removed the Seminoles and located them on the lands of their new national domain granted by the treaty of March 21, 1866.

Furthermore, the purchase price from the whole 200,000 acres was, immediately and, by the treaty of March 21, 1866, deducted from the proceeds of the sale of the two million acres sold to the United States by the Seminoles.

Clearly title was intended to pass, and did pass by the treaty of March 21, 1866.

Did Robbins in Running the West Boundary Exclude Part of the Seminole Lands from Their Treaty Domain?

This question of fact can be determined by this Court on the record now before it. Respondent concedes (Supple. Memo. p. 17) that "we believe that there may be a shortage in the Seminole tract between the Bardwell and Robbins lines."

As early as 1900, the officials of respondent determined that there was a deficiency in the combined Seminole Domain and further determined that the deficiency was in the 200,000-acre treaty tract (R. 21-22; Supple. Memo. pp. 8-9). When the matter was before the lower court, the respondent contended that there was no deficiency in the 200,000-acre tract, and relied upon the field notes of the earlier surveys to sustain its position. In order finally to determine the question, the Department of Justice, with the consent of petitioner, requested the General Land Office to make a field examination on the ground and determine finally the question. The field examination made by A. D. Kidder, District Cadastral Engineer of the General Land Office—which was before the lower court, when this case was before it, and which it overlooked—sets forth with particularity the errors made by Robbins and shows conclusively that the Robbins survey of the west boundary excluded 10,351.82 acres from the Seminole Domain (R. 10-17).

Since three of the boundaries were fixed by the Treaty of March 21, 1866, and the showing is clearly made that 10,351.82 acres were excluded by the erroneous Robbins survey, we submit that the only right conclusion is that this strip of 10,351.82 acres lay, and was located, west of the Robbins line and between the Canadian River and the North Fork of the Canadian River. With this plain record before it, we submit that this Court would be fully justified in making the finding of fact on this point, and we further submit that to do so would save petitioner and respondent considerable time and expense in finally settling this case.

The Seminole Nation Did Not Acquiesce in the Erroneous West Boundary.

Respondent further suggests that the case be remanded to the Court of Claims to determine the issue of whether or not the parties acquiesced in the visible boundaries marked by the Bardwell and Robbins line and by such acquiescence defined the 1866 "grant." (Supple. Memo. pp. 17, 18).

This contention overlooks the fact that this is a special proceeding under a special jurisdictional act, which could result in a money judgment only. The suit is brought by the ward against its trustee, and the interests of innocent third parties are not involved. Here we are not trying to move the west boundary of the Seminole lands as it actually exists on the ground and thus upset titles-long since established in order to get back the 10,351.82 acres of Seminole lands; but in pointing out the errors made by Robbins we endeavor to show the Court that the respondent, in itself fixing this boundary, excluded 10,351.82 acres of petitioner's lands from the Seminole domain and included them in the Pottawatomie reservation, that it thereafter erroneously disposed of them as a part of the Pottawatomie lands; and that because of these errors defendant is liable to petitioner for the value of same, as for a taking under the power of eminent domain.

Several cases are cited by respondent on this question (Supple. Memo. p. 18). These cases set forth disputes between independent parties dealing as equals, and have for their purpose fixing the boundary lines on the ground and the recovery of lands in kind. These decisions, therefore, could have no application to a dispute between a trustee and its ward–parties upon an entirely different footing, the ward being dependent upon the trustee for the needed protection of its interests, and in a special proceeding which could result in a money judgment only, and in which the question is the taking of the ward's lands by the trustee (*United States* v. *Creek Nation*, 295 U. S. 103).

As pointed out by respondent (Supple. Memo. p. 18), this same question was passed upon by the Court of Claims in case No. K-334, *Chickasaw Nation* v. *United States*, decided May 5, 1941 (not as yet reported), and the question was decided adversely to respondent in that case.

Furthermore, the record does not show that petitioner acquiesced in the erroneous Robbins line. To the contrary, the record shows that when the errors first became apparent, in 1900, the Seminole Nation requested that it be given the lands to which they were entitled so that they could be included in the allotments (R. 19).

Certainly the complaint of the Seminoles requesting the full acreage due them, and imparting all the knowledge they had of these errors, was sufficient to acquaint respondent of the errors, and afforded respondent an opportunity to investigate the records solely in its possession—the same ones that are now before us—and to correct these errors. However, respondent did nothing, but permitted the matter to drift down to the time the jurisdictional act was passed authorizing this suit to be filed.

Acquiescence implies knowledge of the error, and a failure to act to correct it. In this case the Seminoles had no knowledge of the error until 1900 when they requested respondent to correct it.

Even if the Seminoles had agreed upon the Robbins west line under a mistaken apprehension that it was the true line, this would not prevent them from claiming to the true line when the error became known. 4 Ruling Case Law, p. 131; *Ulman* v. *Clark*, 100 Fed. 180, 192:

In *Schraeder Mining Co.* v. *Packer*, 129 U. S. 688, 699, this Court said:

> "The decisions in the other states generally support the rule that owners of adjacent tracts of land are not bound by consent to a boundary which has been defined under a mistaken apprehension that it is the true line, each claiming only the true line wherever it may be found, and that in such cases neither party is precluded or estopped from claiming his own rights under the true one, when it is discovered. * * *"

The contention of respondent may be stated in another way—that the Indians are bound by the lapse of time and the statutes of limitation, the doctrine of acquiescence being based upon silence for a period of time after a knowledge of the errors in the boundaries. A complete answer to this contention is found in the terms of the special jurisdictional act of May 20, 1924, c. 162, 43 Stat. 133, which provides in part that the Court shall have jurisdiction to adjudicate and render judgment on claims presented—

> "* * * notwithstanding the lapse of time or statutes of limitation, * * *."

The statutes of limitation being expressly waived, this whole controversy is to be treated as though it had occurred just yesterday.

For the reasons above set forth we submit that there is no merit to this contention of respondent, and that the petitioner may avail itself of this, its first opportunity of presenting this claim for final settlement.

When Did the Taking of Plaintiff's Lands Occur?

Respondent suggests (Supple. Memo. p. 19) that the matter be remanded to the lower court to determine the question when, if the Seminole Nation received title to all of the 200,000 acres by the treaty of March 21, 1866, that land was taken by the respondent.

We submit that the facts in this case are similar to those in *United States* v. *Creek Nation*, 295 U. S. 103, and that the law laid down by this Court in that case is the law governing this case. That the land was not taken in 1871, when the Pottawatomies were placed on the strip of 10,351.82 acres, was decided in the *Creek* case. The Pottawatomie Treaty of 1867 does not show any intention on the part of the respondent to take Seminole lands, but directs the Pottawatomie Indians to select a location without interfering with the locations made for other Indians; likewise, the letter of the Secretary of Interior in 1870 (Appendix, Supple. Memo. of

Res., pp. 29-30) shows that there was no such intention to take Seminole lands.

Furthermore, the Pottawatomie Treaty of February 27, 1867, 15 Stat. 531, does not convey a fee simple title to the Pottawatomies, but merely the Indian "right of occupancy"; and, therefore, the cession to the Pottawatomies was not intended to convey a fee simple title either of respondent's lands or petitioner's lands. The Seminole Nation's fee simple title to the 200,000 acres vested by their treaty and this title remained in that nation until such time as respondent performed acts and made disposals, which—through a failure to correct them after full knowledge of the facts—created the taking of the title of the Seminole Nation (*United States* v. *Creek Nation*, 295 U. S. 103).

Respondent asks this Court to compare *Shoshone Tribe* v. *United States*, 299 U. S. 476, 495. This was one of the so-called "wild tribe" cases, and would have no application to the question of the taking of fee simple title which is herein involved. The "wild tribes" held merely a "right of occupancy" of their lands, the fee being in the United States; and an intrusion on and occupancy of their lands would entirely destroy their right of possession, and would give rise to a cause of action for the value of this "right of occupancy" as of the date of the intrusion. Thus the title involved in the above case was the usual "right of occupancy". When the Government intentionally moved the Arapahoes on this reservation under a military escort and placed them in possession of part of the Shoshone lands, such acts divested the Shoshones of any and all the rights they had in the lands thereafter occupied by the Arapahoes, and the Shoshones' cause of action arose at that time, as everything that had been previously granted them was then intentionally taken. Furthermore, the United States took the land with full knowledge that such lands belonged to the Shoshone Tribe of Indians. It was a direct, intentional, and complete taking in 1878 when the Government moved in the Arapahoes.

In this case the Seminole Nation held the fee simple title to the lands in question, and by the treaty of March 21, 1866, was guaranteed quiet possession thereof, and any intrusion upon the Seminole lands, or any occupancy of said lands by any intruder, or other tribe, would not operate to divest the Seminole Nation of its fee simple title.

In the instant case the fact that Seminole lands were excluded from their domain was inadvertent, and was not discovered until years later, in 1900. After the survey sectionalizing the land was made by the Geological Survey, both petitioner and respondent became apprised of the error. This respondent concedes (Supple. Memo. p. 8). Therefore, there could be no intent by respondent to take the Seminole fee simple title to these lands, until such time as it had full knowledge, or ample means of knowledge, that the Robbins survey was erroneous, and that it was erroneously issuing fee simple patents on lands, which it had previously granted to petitioner by the Treaty of March 21, 1866, and then failed to take steps to correct them, thus confirming them.

When patents were erroneously issued to petitioner's lands, pursuant to the Act of 1891, and when the errors became apparent, and respondent failed to cancel patents already erroneously issued, and continued to issue more patents on the land in question, thus confirming them, and the taking is fixed as of the date of the patents. This is petitioner's position and we submit that it is clearly governed by the Creek case, *supra*.

Was the 175,000 Acre Tract a Gratuity?

The question concerning the 175,000 acre tract is also involved in *Seminole Nation* v. *United States*, No. 348, this Term.

Respondent now contends (Supple. Memo. p. 21; Resp. Br. Case No. 348, pp. 72-80) that the acquisition of the 175,000-acre tract for the Seminoles was a gratuity, and that it should have an allowance of $175,000.00 as a gratuity offset,

which was the amount paid by the respondent to the Creek Nation for this land.

This 175,000-acre tract was used by the lower court in this case and also in case No. 348, the result being that respondent was given credit for this item in two different cases, in two different amounts, and all this was done by two different processes and methods. We do not believe respondent contends that it should have more than one allowance for this item, and therefore confine our argument solely to the question of whether or not this 175,000-acre tract involved an element of gratuity.

We have therefore contended and shown (Pet. Br. pp. 22-31) that this $175,000.00 was not a gratuity, but was an item of reparation, disbursed to repair a wrong done by respondent to the Seminole Nation. This contention we submit is correct, right and just.

In addition to reasons heretofore set forth (Pet. Br. pp. 22-31) petitioner directs the attention of the Court to the question of the *intent of Congress* at the time the 175,000-acre tract was purchased from the Creeks and turned over to the Seminole Nation. Did Congress intend to make a gift of this tract to the Seminole Nation, or did Congress intend to turn this tract over to the Seminole Nation for the purpose of repairing a wrong done, and with the intention of compensating them in some measure for the wrong?

When a claim is made by one party against another for a contractual breach or for a tortious wrong, and in the process of settlement, the injured party receives a compensatory recovery, can it be said that under such circumstances, the compensatory recovery is to be considered as a gift or gratuity?

We submit that the logical answer to these questions in the light of the circumstances would affirm petitioner's contention that the $175,000 item was not a gratuity, but was merely reparation, and that it was so intended and determined by Congress.

Should the Court decide the questions above enumerated in accordance with the views of petitioner, the case could then be remanded to the lower court with directions to determine the value of the Seminole lands in question as of the dates of the issuance of patents thereto, and further to award just compensation in accordance with the rule laid down in *United States* v. *Creek Nation*, 295 U. S. 103.

Respectfully submitted,

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